BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CORDELL A. STEWART	)	
Claimant	)	
VS.	)	
	)	
ACCESS CONTROL SOLUTIONS, LLC	)	Docket No. 1,064,743
Respondent	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the July 24, 2014, Order entered by Special Administrative Law Judge (SALJ) Jerry Shelor. Mark Beam-Ward of Overland Park, Kansas, appeared for claimant. D'Ambra M. Howard and Ryan D. Weltz of Overland Park, Kansas, appeared for respondent.

The record consists of the May 8, 2014, regular hearing transcript and exhibits thereto; and all pleadings in the administrative file. The record also includes numerous deposition transcripts and exhibits thereto. Because this appeal involves a procedural matter, the Board considered only the regular hearing transcript and the pleadings in the administrative file.

ISSUES

This claim proceeded to regular hearing on May 8, 2014, during which the following exchange took place between ALJ Rebecca Sanders and claimant's attorney:

> Judge Sanders: All right. And are you making a claim for future medical?
>
> Mr. Beam-Ward: No.[1]

[1] R.H. Trans. at 8.

At the regular hearing, ALJ Sanders set terminal dates of June 9, 2014, for claimant and July 9, 2014, for respondent and later issued an Order to that effect. Claimant filed his submission letter on June 6, 2014. Respondent filed its submission brief on July 8, 2014. On July 10, 2014, claimant filed a supplemental submission letter. Also on July 10, 2014, claimant filed a Motion to Amend Stipulations. The motion requested future medical treatment be considered an issue, because Dr. Lowry Jones testified claimant would need future surgery on his right knee. On July 15, 2014, respondent filed a memorandum in opposition to the Motion to Amend Stipulations.

On June 23, 2014, by Order of the Director of Workers Compensation, SALJ Shelor was appointed. He issued an Order on July 24, 2014, that stated:

> NOW on this 18th day of July, 2014, the above-captioned case came on for a conference call. The claimant appeared by counsel, Mark Beam-Ward. The Respondent appeared by counsel, Ryan Weltz.
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> After hearing remarks of counsel, this decision follows:
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> > Claimant should be entitled to future medical treatment as recommended by his treating physician, Dr. Lowry Jones, if necessary.[2]

No award has been issued. Respondent appealed the SALJ's Order, alleging: (1) a telephone conference is not a hearing and, therefore, no hearing under K.S.A. 2012 Supp. 44-523 was held on claimant's motion; (2) the SALJ exceeded his authority by issuing an order granting future medical benefits prior to the award; and (3) respondent was prejudiced because claimant filed the motion after the terminal dates for both parties expired and after Dr. Jones was deposed.

Claimant asserts the SALJ's Order is not a final order under K.S.A. 2012 Supp. 44-551, nor an appealable order under K.S.A. 2012 Supp. 44-534a. Therefore, the Board has no jurisdiction to consider respondent's appeal.

Claimant's brief indicated the Order is confusing and asserted the SALJ's intent was merely to grant claimant's motion to make future medical treatment an issue. According to claimant, respondent should have requested the SALJ to clarify the Order, instead of appealing to the Board. Claimant contends that had the SALJ issued an order granting claimant's motion to make future medical treatment an issue, the Board would have no jurisdiction to consider that order. Claimant refers to the telephone conference as a hearing. He asserts that during the telephone hearing, respondent did not indicate it had any additional evidence to present and claimant offered to allow respondent to depose Dr. Jones a second time, but respondent declined.

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[2] SALJ Order at 1.

The issues on appeal are:

1. Does the Board have jurisdiction to consider respondent's appeal?

2. Did the SALJ exceed his authority by ordering claimant should be entitled to future medical treatment?

FINDINGS OF FACT

Because the decision in this case is based purely on a procedural matter, the facts concerning the merits of the claim are of little importance. All relevant facts are set forth above.

PRINCIPLES OF LAW AND ANALYSIS

Claimant asserts the SALJ's Order is not a final order under K.S.A. 2012 Supp. 44-551, nor an appealable order under K.S.A. 2012 Supp. 44-534a. This Board Member agrees future medical treatment is not one of the four preliminary hearing issues over which the Board has jurisdiction to consider under K.S.A. 2012 Supp. 534a(a)(2).

K.S.A. 2012 Supp. 44-551(i)(2)(A) states:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

The Board has jurisdiction to review decisions of administrative law judges only to the extent provided in the Act. The Board has jurisdiction to review preliminary hearing orders as to disputed issues of compensability as specifically set forth in K.S.A. 2012 Supp. 44-534a(a). The Board also has jurisdiction to review preliminary hearing orders under K.S.A. 2012 Supp. 44-551 if it is alleged that the judge exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing. Pursuant to K.S.A. 2012 Supp. 44-551, the Board is provided with jurisdiction to review final orders, awards, or modifications of awards entered by an administrative law judge. Such jurisdiction does not generally extend to interlocutory orders.

Respondent alleges the SALJ exceeded his authority by ordering future medical treatment before an award was issued. Although the SALJ may have intended his Order to allow claimant to raise the issue of future medical treatment, that is not what the Order states. Instead, the SALJ's Order provides claimant should be entitled to future medical treatment as recommended by his treating physician, Dr. Lowry Jones, if necessary. The Board must consider the Order as written and not based on a party's interpretation of what the SALJ might have intended. There is a legitimate question that by ordering future medical treatment for claimant prior to issuing an award, the SALJ exceeded his authority. Therefore, the Board has jurisdiction under K.S.A. 2012 Supp. 44-551(i)(2)(A) to consider respondent's appeal.

K.S.A. 2012 Supp. 44-510h(e) provides:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2012 Supp. 44-510k governs post-award medical benefits and provides, in part:

> (a)(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.
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> (2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the

> prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.
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> . . .
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> (4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

Those two statutes, in tandem, require a claimant to present sufficient evidence to overcome a presumption that he or she requires no future medical treatment after reaching maximum medical improvement. If future medical treatment is an issue, it is to be addressed in the award or in a post-award medical award, not in an Order that precedes the award. Simply put, the SALJ exceeded his authority by issuing the July 24, 2014, Order.

The record contains no information, such as a notice of hearing, regarding the conference call that resulted in the SALJ's Order. It is unknown who instigated the conference call, how much advance warning the parties had of the conference call or if the conference call was intended to be a hearing on the merits of claimant's Motion to Amend Stipulations. Nor was any recording or transcript of the telephone call made. The Board and appellate courts have routinely held the parties in a workers compensation matter are entitled to a hearing before an order is issued in a contested matter.

In *Collins*,[3] the Kansas Supreme Court set aside a district court ruling that denied a workers compensation claimant benefits because claimant's attorney was not present at oral argument. Claimant's attorney, who practiced in Topeka, was notified at 1:30 p.m. by telephone of the 2 p.m. hearing in Wichita. The Kansas Supreme Court held:

> Here claimant asserts he was denied the opportunity to be heard in the district court, in that he was not given an opportunity to have his cause argued by counsel before a decision was rendered reversing the director's award. We are inclined to agree.
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> . . .
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> The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case. (*Rydd v. State Board of Health*, 202 Kan. 721, Syl. ¶ 3, 451 P.2d 239.)

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[3] *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

In *Richa v. Wichita Precision Tool Co.*, 190 Kan. 138, 373 P.2d 201, we said:

> ". . . We adhere to the theory that substantial justice is not done unless a litigant is given an opportunity to be heard. Unless counsel on timely request is given the right to analyze the facts and present his theory as to the application of the law, the litigant has not been heard. The right to be heard is a matter of both private and public consequence. Argument by counsel has always been considered, by the courts of this state, and should continue to be considered as an effective aid in rendering justice." (p. 145.)[4]

In *Scroggin*,[5] the ALJ, without either party filing a motion or holding a hearing, ordered claimant's former attorney to pay court reporter costs and fees. The Board held claimant's former attorney was not afforded an opportunity to be heard and remanded the matter to the ALJ for a hearing. In *Dutro*,[6] the Board majority stated:

> Claimant requests post-award attorney fees. The time itemization provided to the ALJ and utilized by the ALJ in awarding attorney fees was not presented to the court at the post-award hearing. Instead, it was attached to claimant's brief to the ALJ. Respondent contends that no such copy of the fee request was provided to respondent. No hearing was held by the ALJ before the post-award order was issued. Additionally, the award grants attorney fees. However, the list attached to claimant's brief lists both attorney fees and expenses, some of which are specifically prohibited by the Supreme Court's ruling in *Higgins*. [Footnote citing: *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 204 P.3d 1156 (2009).] K.S.A. 1999 Supp. 44-536(h) is clear in its requirement that the matter "shall be heard and determined" by the administrative law judge "after reasonable notice to all interested parties and attorneys." The failure by the ALJ in this case to hold or even schedule a hearing violates the due process rights of respondent.

Claimant, in his brief, uses the term hearing when referring to the telephone conference. Respondent argues a conference call is not congruent to a hearing under K.S.A. 2012 Supp. 44-523. The Board cannot determine if the parties and the SALJ intended the telephone conference to be a hearing on the merits of claimant's Motion to Amend Stipulations. Nor can the Board determine what, if any, advance notice of the telephone conference respondent had or what respondent was told would take place at the conference call. There is no record of the conference call that can be reviewed.

This is not a final agency action.

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[4] *Id.* at 618-620.

[5] *Scroggin v. Heartland Park Raceway, LLC.*, No. 1,051,858, 2013 WL 1384385 (Kan. WCAB Mar. 18 2013).

[6] *Dutro v. Russell Stover Candies*, No. 255,452, 2011 WL 494956 (Kan. WCAB Jan. 21, 2011).

WHEREFORE, the Board vacates the July 24, 2014, Order entered by SALJ Shelor and remands this matter to the SALJ with instructions to conduct a hearing and issue an Order on claimant's Motion to Amend Stipulations.

IT IS SO ORDERED.

Dated this ____ day of September, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark Beam-Ward, Attorney for Claimant
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Honorable Jerry Shelor, Special Administrative Law Judge

Honorable Rebecca Sanders, Administrative Law Judge